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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. ——

JOHN R. GAGNON,
Petitioner,

v.

GERALD H. SCARPELLI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, John R. Gagnon, hereinafter called the "warden," respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 28, 1971.

OPINIONS BELOW

The opinions below are not reported. They are printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1971. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 2101 (c).

QUESTION PRESENTED

Whether a person convicted and sentenced by a state court with execution stayed, placed on probation in custody of a state agency, independent of the court, having sole authority to revoke his probation and execute the sentence, has a Fourteenth Amendment due process right to a hearing with assistance of counsel on whether grounds exist to revoke his probation.

The Court of Appeals held in the affirmative.

STATUTES INVOLVED

Wisconsin Statutes 1965, 57.01 (1), 57.02 and 57.03 (1)

57.01 Probation of felons. (1) When a person is convicted of a felony (convictions under s. 52.05 excepted) and it appears to the court from his character and the circumstances of the case that he is not likely again to commit crime and that the public welfare does not require that he shall suffer the penalty of the law, the court may, by order, withhold sentence or impose sentence and stay its execution and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose as a condition of such order or of continuing it in effect that he shall make restitution or pay the costs of prosecution or do both. The period of probation may be made consecutive to a sentence of imprisonment on a different charge, whether imposed at the same time or previously. Consecutive periods of probation may be imposed. In case the conditions of probation are violated, the current probation and all subsequent consecutive probations shall be revoked.

57.02 Control of probationer. Except as provided otherwise in section 57.025, every probationer in the custody of the department shall be subject to the control of the department under regulations applicable to paroled persons. Upon the entry of the order of probation the court or the clerk of the court shall deliver a certified copy of the record in the case to the department, whereupon the custody of the probationer vests in the department.

57.03 Return to court; discharge. (1) If a probationer in its charge violates the conditions of his probation, *the department* may order him brought before the court for sentence which shall then be imposed without further stay or *if already sentenced may order him to prison;* and the term of sentence shall begin on the date he enters the prison. *A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.*

STATEMENT OF THE CASE

The respondent was convicted on July 9, 1965, in the circuit court for Racine county, Wisconsin, of armed robbery and sentenced to not more than 15 years imprisonment, execution was stayed and he was placed on probation in the custody of the State Department of Public Welfare (since renamed the State Department of Health and Social Services) for a term of seven years.

Pursuant to the interstate compact for parole and probation supervision (see 4 U.S.C. §112) he was permitted to go to Illinois for supervision. On August 5, 1965, a day-time burglary occurred in Deerfield, Illinois, respondent was arrested nearby, made a full confession to an assistant state's attorney and was photographed by a Chicago Tribune staff photographer showing cuts on his hand and wrist suffered in his flight through a broken window from the burglarized premises. On September 1, 1965, after recommendation by the probation and parole services, his probation was revoked by the State Department of Public Welfare and he was ultimately brought to the Wisconsin state reformatory and was subsequently transferred to the Wisconsin correctional institution of which petitioner is the warden.

On December 16, 1968, he filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin alleging denial of right to a judicial hearing on why his probation should be revoked, denial of right to counsel at any probation hearing and denial of "the right of probation under the laws of the state of Illinois." He based his claim on the due process clause of the Fourteenth Amendment and the Sixth Amendment guarantee of the right to counsel in criminal prosecutions.

Petitioner answered denying the sufficiency of the petition to state a claim on which relief can be granted and asserting the facts which led up to the revocation. The grounds alleged for revocation were association with known criminals and being involved in and arrested for the Deerfield burglary of August 5, 1965.

On September 21, 1970, the district court granted the application for the writ but stayed its order for a period of 30 days to enable a Wisconsin court to hold a hearing on respondent's probation revocation if it so desired. The petitioner (warden) appealed to the United States Court of Appeals for the 7th Circuit on October 1, 1970, and the order of the district court was affirmed on December 28, 1971.

Further facts are stated in the opinion of the district court contained in the Appendix.

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Is In Conflict With The Ruling Decision Of This Court

This Court has held that there is no constitutional right to a hearing when probation is revoked. In *Escoe v. Zerbst* (1935), 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566, the Court said that the applicable District of Columbia *statute* gave petitioner a right to a hearing before revocation of probation but expressly cautioned that:

> "In thus holding, *we do not accept the petitioner's contention that the privilege has a basis in the Constitution,* apart from any statute. Probation as suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect

of its duration as Congress may impose. *Burns v. United States* 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 at 492." (Emphasis supplied)

Thus any right to such a hearing stems solely from a statutory grant and not from the United States Constitution. In the absence of statutory provision, the probationer is not entitled to a revocation hearing. Whether labeled "dictum" or not, this Court deliberately set forth the above statement of law in response to an argument advanced by a party. It has not been repudiated by this Court and it was relied upon by the Wisconsin legislature when it repealed the former requirement (Wis. Stats. 1945, sec. 57.03(1)) of a "personal hearing" in case of probation revocation by the department (Wis. Laws 1947, Ch. 477, sec. 5).*

In *Mempa v. Rhay* (1967), 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336, this Court carefully avoided any conflict with *Escoe* when it distinguished the case of a prisoner who had been sentenced before probation from one who had not; only in the latter case, that of *deferred sentencing*, is a hearing and the assistance of counsel constitutionally required, and then, inferentially only at the sentencing. This Court thereby avoided any suggestion that such rights applied to probation revocation proceedings as such. This was made abundantly clear in the later case of *McConnell v. Rhay* (1968), 393 U.S. 2, 4, 89 S.Ct. 32, 21 L.Ed. 2d 2:

> ". . . the right to counsel *at sentencing* must therefore be treated like the right to counsel at other stages of adjudication." (Emphasis supplied)

If *Escoe* is eroded by subsequent decisions relating to the dissimilar fields of unemployment compensation, public

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*An interim committee serving between the 1945 and 1947 sessions determined that hearings were unnecessary and provided for their abolition in its revision bill.

employment, and public assistance, the word should come directly from this Court. It is submitted that *Escoe* is still good law.

II. There Is A Conflict Among The Courts Of Appeal On The Point

In holding that there is no right to counsel at probation revocation hearings, the Court of Appeals for the 5th Circuit said in *Shaw v. Henderson* (1970), 430 F. 2d 1116, 1118-1119:

> "We hold the opinion that the right to counsel did not apply to the Lousiana probation revocation hearing here under scrutiny because Shaw was not sentenced at the hearing and no other substantial rights were affected or could have been affected at the hearing . . . Indeed he was under sentence from the beginning of his probation, but he was given conditional liberty which could be revoked when he violated the conditions imposed. We have consistently refused to interfere in traditional probation revocation proceedings unless there is a clear abuse of discretion. *Mempa* does not alter this principle."

The Court in *Perck v. Henderson* (E.D. La. 1970) 317 F. Supp. 29, 32, affirmed (1971), 444 F. 2d 102, added:

> ". . . that if a criminal defendant is represented by counsel at all critical stages of his trial, including sentencing, and is thereafter released on probation, he is *not* thereafter entitled to counsel at a subsequent probation revocation hearing."

A dictum contrary to the decision of the 7th Circuit herein is in the District of Columbia Circuit, Judge (now Mr. Chief Justice) Burger speaking for the court, in *Hyser v. Reed* (1963), 318 F. 2d 225, 236, involving *parole* revocation:

> "The legal proceeding most comparable to revocation of parole is revocation of probation. The Supreme Court has considered claims by probationers that they be accorded full dress hearings by the District Court before revocation and in each instance the Court has rejected the claim."

In accord with the decision below is *Hewett v. North Carolina* (4th Cir. 1970), 415 F. 2d 1316, which held that counsel must be appointed for indigent probationers in all revocation of probation proceedings. Unlike the *Scarpelli* Court which based the right to counsel on the due process clause of the Fourteenth Amendment, the court in *Hewett* characterized the revocation of probation as part of the criminal proceedings to which probationer's Sixth Amendment right to counsel applies.

III. The Decision Below Is In Direct Conflict With The Decision Of The Highest Court Of The State Of Wisconsin

In *State ex rel. Johnson v. Cady* (1970) 50 Wis. 2d 540, 185 N.W. 2d 306, the Wisconsin Supreme Court addressed itself to the issue of counsel at probation revocation hearings in those situations, as in *Scarpelli*, where the defendant was placed on probation after sentence had been imposed and stayed. The petitioner argued that due process, equal protection, the Sixth Amendment to the United States Constitution, and art. 1, sec. 7 of the Wisconsin Constitution compel the presence of counsel at such revocation hearings. The State Supreme Court rejected the contention. It unequivocally held that the assistance of counsel is not constitutionally required at probation revocation hearings:

"A minority of the courts of other jurisdictions have construed *Mempa* as not limited to its factual context, but rather have seen fit to extend the rationale of *Mempa*, and as so extended consider it to be authority for the right to counsel at probation and parole revocation hearings." (citing among other cases, *Scarpelli v. Gagnon* (E.D. Wis. 1970), 317 F. Supp. 72)

"However, the majority of courts considered *Mempa* to apply to its factual context, and thus not to require counsel at a parole or probation revocation hearing. *We here adopt the holdings of the majority and determine that the presence of counsel at the revocation hearing is not required.*" (Emphasis supplied)

IV. The Rule Announced Below Is Undesirable

Sec. 57.02, Wis. Stats. 1965 (now sec. 973.09), provides that in all courts in Wisconsin except those in Milwaukee County, a person placed on probation is in the custody of the state department of public welfare (now health and social services). In cases like *Scarpelli* where the court has already imposed sentence, the department, not the court, orders the probationer to prison and his sentence begins. The control and supervision of probationers, including the power to revoke probation upon the violation of specified conditions, is delegated to the authority of this administrative department. Sec. 939.10 Stats. The situation at hand is thus similar to *parole* revocation in Wisconsin and sister states in that the jurisdiction and supervision of such proceedings is removed from the judicial branch and vested in the state's executive department. See sec. 57.06, Wis. Stats; Smith-Huico Ill. Anno. Stats. 38, sec. 123-1; Cal. Penal Code, sec. 3040.

The Court below correctly held that *Mempa v. Rhay* (1967), 389 U.S. 128, with its emphasis on the Sixth Amendment right to counsel in criminal proceedings, did not extend beyond the imposition of sentence into the probationary proceedings. Fundamental fairness under the due process clause, likewise, does not necessitate the presence of counsel at these purely administrative hearings.

The probationer received the fullest assistance of counsel at all critical stages of the criminal proceedings. His sentence has been imposed by the court and cannot be enlarged at a revocation hearing. No right of appeal or other proceedings remain to be exercised or waived by the defendant to test the propriety of the guilty verdict. The judicial powers have become finalized, and only administrative actions would be affected by probationer's counsel at these revocation proceedings. Imposing the constitutional right to counsel upon the administrative hearing would serve neither the state's nor the probationer's interest.

Both the department and the probationer share a common goal, the successful rehabilitation of the probationer. See sec. 46.01, Wis. Stats. The presence of counsel and the consequent adversary nature of the revocation hearing would work contrary to this purpose. Speaking within the comparable context of parole revocation, the present Chief Justice when a member of the Court of Appeals for the District of Columbia said in *Hyser v. Reed* (1968), 318 F. 2d 225 at 237, 238:

> "The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible.

> Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege. "Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders." Williams v. People of State of New York, 337 U.S. [241] at 249, 69 S.Ct. [1079] at 1084 [93 L.Ed. 1337]. Perhaps the more correct view is that retributive justice is satisfied by the conviction whereas the sentence is a process of treatment. It is important to bear this in mind in determining whether there would be any gain to the parolee or to society in taking steps urged by the dissenting opinions which tend to equate parole processes with criminal prosecutions."

In the performance of their duties, department personnel, including probation and parole officers, are called upon to exercise professional judgment and discretion in determining whether a probationer is fulfilling the conditions of his probation. They are college trained in their field, holding in many cases advanced degrees, and have regular in-service training. By their educational background and experience, they are thoroughly competent to perform their treatment and supervisory functions. Attorneys, on the other hand, are not well suited by their training and duties to the client to assist the department in objectively ascertaining the most suitable disposition for a given probationer. As expressed by the Third Circuit Court of Appeals in *Washington v. Hogan* (3rd Cir. 1960), 287 F. 2d 332, 335, in discussing the usefulness of lawyers at parole revocation hearings:

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole."

Lawyers' numerous objections to certain testimony may severely limit the extent and breadth of the department's inquiry into the probationer's rehabilitative efforts and the events surrounding the alleged probation violation. Aggressive direct and cross-examination may well inhibit probation and parole agents from freely expressing their professional judgments. From the natural reluctance to "take the stand," they may refuse to report all but the most gross violations of probation conditions; the department's control and supervision over the probationer's attempted rehabilitation would thereby diminish. An adversary revocation hearing would also place the probation or parole agent in the undesirable role of state "prosecutor;" his personal relationship with the probationer would be strained and any therapeutic value arising from the probationer-agent relationship would no doubt suffer.

Lengthy and litigious revocation hearings would needlessly divert valuable department personnel time and expertise away from their already overburdened caseloads and administrative functions. The likely logistic problems and delays would result in a reduction of the probation officer's time available for field supervision and personal contact with his probationers.

Rather than expend substantial public funds for the dubious benefit of counsel at these revocation hearings, the state could better use them for the acquisition of additional talented department personnel, such as correctional administrators and social workers including probation and parole officers. They, not lawyers, are prepared to alleviate the present excessive caseload problem.

This is not to argue that probationers may be subjected to unfair treatment or made the victims of wholly arbitrary or capricious decisions during the revocation hearings. We simply submit that the treatment process is not assisted by the presence of counsel, and that assistance of counsel is not constitutionally compelled to assure the essential fairness of these administrative probation revocation hearings.

It is therefore respectfully submitted that certiorari should be granted.

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